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State v. Kellis Respondent's Brief Dckt. 35978

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,

Plaintiff-Respondent,

vs.

TIMOTHY A. KELLIS,

Defendant-Appellant.

NO. 35978

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF LATAH**

HONORABLE JOHN R. STEGNER
District Judge

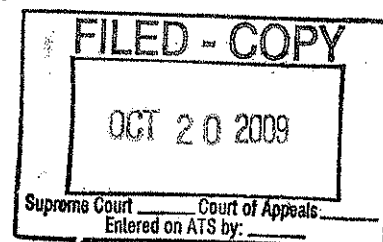
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STATEMENT OF THE CASE

Nature of the Case

Kellis appeals from his sentences for nine counts of lewd conduct with a minor under sixteen, two counts of sexual abuse of a child under sixteen, and one count of attempted lewd conduct with a minor under sixteen.

Statement of Facts and Course of Proceedings

A jury convicted Kellis, a thirty-nine year old Boy Scout camp staff member and school band instructor, of twelve felony counts relating to his sexual abuse of four children who were attending Camp Grizzly in Latah County during the summer of 2007. (PSI, pp.1-2; R., pp.129-134, 266-269, 289-293.) The district court imposed unified sentences of life, with fifteen years fixed, for each of nine counts of lewd conduct with a minor under sixteen; twenty-five years, with fifteen years fixed, for each of two counts of sexual abuse of a child under sixteen; and fifteen years, with five years fixed, for one count of attempted lewd conduct with a child under sixteen, with all sentences to run concurrently. (R., pp.289-293.) Kellis timely appealed the sentences. (R., pp.298-300.)

ISSUES

Kellis states the issue on appeal as:

Did the district court abuse its discretion when it imposed, upon Mr. Kellis, unified sentences of life, with fifteen years fixed, for each of the nine counts of lewd conduct with a minor under sixteen years of age; fifteen years, [sic] five years fixed, for the one count of attempted lewd conduct with a minor under sixteen years of age; and twenty-five years, with fifteen years fixed, for each of the two counts of sexual abuse of a child, with all counts to run concurrently?

(Appellant's brief, p.3.)

The state wishes to rephrase the issues on appeal as:

1. Has Kellis failed to show that the district court violated his due process rights by imposing its sentence to punish Kellis for his continued assertion of innocence?
2. Has Kellis failed to show that the district court abused its discretion by imposing an excessive sentence?

ARGUMENT

I.

Kellis Has Failed To Show That The District Court Violated His Due Process Rights By Imposing Its Sentence To Punish Him For Exercising His Constitutional Rights

A. Introduction

Kellis contends that the district court improperly punished him for his continued assertion of innocence at trial and sentencing. (Appellant's brief, pp.5-8.) Kellis' claim, however, is without merit. The district court recognized the distinction between improperly punishing a defendant for exercising his constitutional rights, and the proper consideration of a defendant's lack of remorse and responsibility taken for his crimes as bearing on a defendant's rehabilitative potential. Kellis has failed to show a due process violation.

B. Standard Of Review

Appellate courts employ a bifurcated standard of reviewing due process claims on appeal, deferring to the trial court's factual findings but freely reviewing the application of the law to the facts found. State v. Schevers, 132 Idaho 786, 788, 979 P.2d 659, 661 (Ct. App. 1999); State v. Gray, 129 Idaho 784, 796, 932 P.2d 907, 919 (Ct. App. 1997).

C. The District Court Did Not Improperly Punish Kellis For His Continued Assertion Of Innocence

Due process prohibits a sentencing court from coercing a defendant into sacrificing the right to assert innocence by threatening a more severe sentence. State v. Lawrence, 112 Idaho 149, 157, 730 P.2d 1069, 1077 (Ct. App. 1986).

However, a court is not completely restricted from utilizing continued assertions of innocence as a factor at sentencing, and may consider a defendant's failure to take responsibility in determining whether the defendant is a candidate for rehabilitation. State v. Murphy, 133 Idaho 489, 494, 988 P.2d 715, 720 (Ct. App. 1999); State v. Brown, 131 Idaho 61, 72-73, 951 P.2d 1288, 1299-1300 (Ct. App. 1998); State v. Nooner, 114 Idaho 654, 655-656, 759 P.2d 945, 946-947 (Ct. App. 1988); State v. Sanchez, 117 Idaho 51, 52, 785 P.2d 176, 177 (Ct. App. 1990) (The sentencing judge "need not ignore a persistent denial of wrongdoing, after guilt has been reliably adjudicated.").

The district court in the present case clearly recognized this distinction. Several times during the sentencing hearing, the court emphasized that it was not punishing Kellis for the exercise of his constitutional rights, or for his continuing assertion of innocence:

I can't hold it against you, Mr. Kellis, that you took this case to trial. There are a number of statements in the presentence that suggest that I hold it against you for exercising your constitutional right to testify. I don't think I can, as a judge, punish someone for the exercise of their constitutional rights.

...

I don't think I can punish you for going to trial. I think I said that earlier. That's your constitutional right. If I were to punish people for going to trial, I don't think I would be doing my job.

(Tr., p.1071, Ls.11-16; p.1074, Ls.6-9.)

On appeal, Kellis expresses particular concern with the district court's statements to Kellis at sentencing that, "[y]ou are not taking responsibility for the actions that you have been convicted of. And I can and do punish you for that,"

(Appellant's brief, p.7 (citing Tr., p.1071, Ls.17-19)) and "I guess, given the fact that you have shown no remorse and have taken no responsibility, the easy question is whether I should impose a life sentence. I should impose a life sentence given that you haven't demonstrated any remorse and you haven't taken responsibility for any of these offenses" (Appellant's brief, p.8 (citing Tr., p.1073, L.24 – p.1074, L.4)). From these statements, Kellis concludes that the district court imposed indeterminate life sentences to punish him for exercising his constitutional right to maintain his innocence. (Appellant's brief, pp.7-8.) However, a review of the applicable law and the record shows Kellis' claim to be without merit.

To analyze claims of vindictiveness at sentencing on appeal, the Idaho Court of Appeals has adopted a "totality of the circumstances" approach, which requires an examination of the entire record. Brown, 131 Idaho at 72, 951 P.2d at 1299. The Court has specifically rejected the "per se" approach followed by several other jurisdictions, which requires that a sentence be vacated whenever a trial court made any singular comment that implied the defendant was being punished for exercising his rights to plead not guilty. Id.; State v. Regester, 106 Idaho 296, 299-300, 678 P.2d 88, 91-92 (Ct. App. 1984). The Court of Appeals has recognized instead that "a sentencing judge's references to the defendant's exercise of his right to trial, which would not pass a 'per se' test, might not reflect actual vindictiveness." Regester, 106 Idaho at 300, 678 P.2d at 92.

In Brown, the Idaho Court of Appeals reviewed the totality of the circumstances and the context of the district court's sentencing hearing

statements that appeared, in isolation, to imply improper punishment. The Court quoted the relevant portion of the district court's sentencing comments:

Had you admitted your guilt at some point in this [c]ourt proceeding, you had an excellent chance, having acknowledged responsibility for these acts of having the benefit of the Cottonwood program. And you had that opportunity all the way up to just a few moments ago and you have not taken responsibility for these acts and you've had repeated opportunities to do so. You want to maintain your innocence, that's fine. The evidence shows otherwise. And you have to suffer the consequence. You have to learn that it's not just one thing to abuse a young lady, it is another thing to abuse the justice system. I find that you have abused the justice system and you are paying a consequence because of that.

Brown, 131 Idaho at 72-73, 951 P.2d at 1299-1300.

The Idaho Court of Appeals affirmed the sentence, noting that "[o]ur review of the record adds a good deal of context to the statements made by the court." Id. at 73, 951 P.2d at 1300. The Court found that this context revealed that the district court's comments about taking responsibility did not express vindictiveness, but merely the court's conclusion that because Brown was not willing to accept responsibility for his actions, he was not a good candidate for rehabilitation through the retained jurisdiction program. Id.

Similarly, in the present case, an inspection of the entire context of the district court's comments reveals that the court properly considered Kellis' refusal to take responsibility for his actions, and this failure's relationship to Kellis' rehabilitative potential. Prior to the comments Kellis takes issue with on appeal, the district court recognized that without taking responsibility for his crimes, Kellis would not be successful in sex offender treatment:

I'm no expert on sex offense, but I can tell you that in talking to people who treat sex offenders, the most important criteria is empathy. You have to be able to appreciate what you've done and

to appreciate the position that you've put these young boys in. And unless and until you develop empathy for the victims of these offenses, I don't have much hope that you will ever be released from the penitentiary.

I've dealt with the Probation and Parole Commission on other cases, and I have no expectation that you will be released from the penitentiary until the Parole Commission concludes that you have rehabilitated yourself. And rehabilitation will require, as a first step, that you recognize what you did wrong and that you empathize with your victims and you appreciate what you've done to them. And until you do that, my expectation is that you will be incarcerated in the State of Idaho.

(Tr., p.1069, L.12 – p.1070, L.1).

Later the district court reiterated:

I think it's a similar analysis to the last criteria that when you have *no remorse and no empathy* for your victims, I don't have much optimism that you can or will rehabilitate yourself. And if you can't rehabilitate yourself, then I don't have much hope that another crime isn't [sic] unlikely.

(Tr., p.1073, Ls.17-22.)

The context of the district court's comments reveals that it properly considered Kellis' failure to take responsibility for his crimes as relating to Kellis' rehabilitative potential. The court plainly recognized that without this necessary first step, rehabilitation attempts would not be successful. Kellis has failed to establish a violation of his due process rights.

Kellis claims that, even if the district court did not violate his due process rights by considering his lack of remorse and failure to accept responsibility for his crimes, it nevertheless abused its discretion because, he contends, the court's "statements crossed the line from seemingly appropriate considerations about rehabilitative potential to punishment for the act of exercising his right to

remain silent.” (Appellant’s brief, pp.5-8.) This claim fails for two independent reasons. First, Kellis cites no authority for the proposition that a claim of vindictiveness at sentencing implicates the district court’s discretion, and as such, has waived consideration of this argument on appeal. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). Second, contrary to Kellis’ assertion, claims of sentencing vindictiveness do not implicate a district court’s discretion. See Regester, 106 Idaho at 300, 678 P.2d at 92 (“[W]e do not view the ‘totality of circumstances’ rule as an invitation for an appellate court to weigh the sentence against the entire record to treat the vindictiveness issue as merely a question of abuse of sentencing discretion.”) Rather, to succeed on a claim of vindictive sentencing a defendant must show a violation of due process, i.e., that the sentencing court actually “intent[ded] to punish him for exercising his right to trial in imposing sentence.” Id. at 299, 678 P.2d at 91. Having failed to even allege a due process violation, much less demonstrate one from the record, Kellis has failed to show any basis for reversal.

The totality of the circumstances and review of the entire record reveals that the district court considered Kellis’ failure to take responsibility, and his lack of remorse, in the proper context of his lack of rehabilitative potential. Kellis has failed to show that the district court violated his due process rights by considering his failure to take responsibility and lack of remorse as factors bearing on its sentencing decision.

II.
Kellis Has Failed To Show That The District Court Abused Its Discretion By
Imposing An Excessive Sentence

A. Introduction

Kellis contends that the district court abused its discretion by imposing an excessive sentence. (Appellant's brief, pp.4, 8-10.) Considering any reasonable view of the facts, however, Kellis has failed to establish that the district court abused its discretion in imposing concurrent unified life sentences with fifteen years fixed for each of nine counts of lewd conduct of a child under sixteen, and lesser concurrent sentences for three additional felony sex abuse counts.

B. Standard Of Review

When a sentence is within statutory limits, the appellate court will review only for an abuse of discretion. State v. Farwell, 144 Idaho 732, 736, 170 P.3d 397, 401 (2007). The appellant has the burden of demonstrating that the sentencing court abused its discretion. Id.

C. The District Court Acted Within Its Discretion In Imposing Its Sentence

To determine whether the trial court abused its sentencing discretion, an appellate court independently reviews "all the facts and circumstances of the case," and considers the nature of the offense and the character of the offender. State v. Cope, 142 Idaho 492, 500, 129 P.3d 1241, 1249 (2006). To prevail, the appellant must establish that, under any reasonable view of the facts, the sentence is excessive considering the objectives of criminal punishment. Id.

Those objectives are "(1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing." State v. Cross, 132 Idaho 667, 671, 978 P.2d 227, 231 (1999) (internal citations omitted). Idaho Code § 19-2521 further provides criteria a district court must consider before it sentences a defendant to imprisonment.

The district court expressly considered each of these factors in imposing its sentence. (Tr., p.1068, L.12 – p.1073, L.24.) The district court's thorough and methodical sentencing analysis included consideration of the risk of reoffense, the possibility of rehabilitation, the nature and seriousness the crimes, deterrence, Kellis' criminal history, the harm caused by the crimes, Kellis' lack of remorse and failure to take responsibility for his crimes, whether provocation played a part in the crimes, the existence of any grounds tending to excuse or justify the conduct, whether the conduct of the victims induced or facilitated the commission of the crimes, restitution issues, and Kellis' character and attitude. (Id). The court ultimately determined that a lengthy period of incarceration was necessary to protect society and impress upon Kellis the seriousness of his crimes. (Id.) Contrary to Kellis' assertion on appeal, the record supports the sentence imposed.

The nature of Kellis' crimes and the profound impact they had on his victims and their families warranted the district court's sentence. Over a period of approximately two months during the summer of 2007, Kellis violated the trust of his victims and committed twelve egregious felony sex abuse crimes.

A.G., the fifteen-year-old victim of the crimes charged in counts VIII and IX of the indictment, testified that Kellis came into his tent at night and touched him "in the penis area," and that Kellis repeated this conduct "every other night or so." (R., pp.130-131; Tr., p.373, Ls.6-9; p.387, L.14 – p.388, L.24.) A.G. also described an occasion when he was working in the area of the camp's shotgun range, when Kellis asked him to sit on his lap. (Tr., p.393, L.19 – p.395, L.19.) When A.G. did so, Kellis unzipped A.G.'s shorts and touched him in the "penis area," under his clothes. (Tr., p.395, Ls.19-21.) Shortly after, Kellis unzipped A.G.'s shorts again, pulled them down, and performed oral sex. (Tr., p.395, Ls.21-25.)

S.O., the fifteen-year-old victim of the crimes charged in counts I-IV and XI of the indictment, testified that while he was watching a movie, Kellis entered the room, sat next to him on a sofa, and rubbed his upper leg and stomach for approximately ten minutes. (R., pp.130-131, 134; Tr., p.439, Ls.8-11; p.452, L.8 – p.453, L.16.) Later that night, Kellis came into S.O.'s tent, pulled down S.O.'s underwear, touched his penis, and performed oral sex. (Tr., p.457, L.20 – p.458, L.14.) The next week, Kellis returned to the tent, again inappropriately touched S.O. and performed oral sex, and attempted to force S.O. to perform oral sex on him. (Tr., p.460, Ls.11-16.) During a third incident, Kellis attempted to have anal sex with S.O., until A.G., who was also in the tent at the time, woke up. (Tr., p.461, Ls.1-21.)

D.C., the sixteen-year-old victim of the crime charged in count X of the indictment, testified that while he was cleaning the shotgun storage shed, known

as the “toaster,” Kellis put his hands in DC’s underwear and touched his penis. (R., p.133; Tr., p.500, Ls.19-22; p.512, L.9 – p.515, L.5.)

J.S., the fifteen-year-old victim of the crimes charged in counts V-VII and XII of the indictment, testified that Kellis came into his tent at night, laid down, touched J.S.’s penis, and told him “I want some,” and “I’ll make you feel good.” (R., p.131-132, 134; Tr., p.549, Ls.10-13; p. 564, L.22 – p.566, L.1.) J.S. testified that Kellis came into his tent every night for approximately the last five weeks of the summer. (Tr., p.566, L.24 – p.567, L.6.) On another occasion, when J.S. was alone with Kellis on the shotgun range near the “toaster” storage area, and requested that Kellis let him shoot, Kellis responded that “you have to have toaster time.” (Tr., p.567, L.23 – p.568, L.4.) In the storage area, Kellis told J.S., “drop your pants, then you can shoot the shotgun.” (Tr. p.568, Ls.5-8.) J.S. did so, and Kellis touched his penis. (Id.)

While Kellis did not have a prior criminal conviction at the time of his sentencing, he did have a pending charge of rape of a child in the 2nd degree in Asotin County, WA. (PSI, p.14.) In addition, the present case, and its twelve associated felony sex abuse crimes, itself constitutes a continuing course of conduct and a substantial and troubling criminal history. The sheer quantity of the incidents with multiple victims over a relatively short period of time is striking. Kellis spent much of the summer of 2007 preying on boys at Camp Grizzly.

Despite the serious and repeating nature of his crimes, and the multiple victims he abused, Kellis greatly benefitted from his sentences being imposed concurrently. For his twelve felonies, Kellis faced up to nine consecutive life

sentences, and a further consecutive seventy-five year term. I.C. §§ 18-1506; 18-1508; 18-306. Kellis is extremely fortunate to instead be eligible for parole after a mere fifteen years.

At sentencing, the district court discussed how Kellis “violated the trust that was placed in [Kellis] by the Boy Scouts.” (Tr., p.1068, Ls.22-24.) The court noted how “[t]hose four young boys were obviously harmed in ways that are unspeakable.” (Tr., p.1071, Ls.9-10.) In recalling the victim impact statements presented prior to sentencing, the court noted that it was “moving to hear parents talk in terms of the effect your acts have had on their lives, not just their sons’ lives.” (Tr., p.1070, Ls.10-13.) The pre-sentence investigator concluded that “collateral information as well as victim statements reveal that Mr. Kellis used his authority as a teacher and camp counselor as a way of grooming and/or intimidating his victims and there appears to be an established pattern of sexual abusive behaviors with Mr. Kellis towards his young victims.” (PSI, p.21.)

Considering any reasonable view of the facts as applied to the proper sentencing criteria, and the district court’s analysis, Kellis has failed to establish that the district court abused its discretion by imposing the aggregate unified life sentence with fifteen years fixed.

CONCLUSION

The state respectfully requests this Court to affirm Kellis’ sentence.

DATED this 20th day of October 2009.



MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 20th day of October 2009, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

ELIZABETH ALLRED
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



MARK W. OLSON
Deputy Attorney General

MWO/pm